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BEFORE THE GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

In re AppleTree Institute for Education Innovation, Inc.

Appeal No. 17532

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17532
EXHIBIT NO. 33

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BRIEF OF APPELLANT IN RESPONSE TO INTERVENOR'S REPLY BRIEF

As invited by the Board at its November 21 public hearing, Appellant AppleTree hereby responds to the Reply Brief of Intervenor Northeast Neighbors for Responsible Growth ("NNRG"). With regard to both of the legal questions involved in this appeal, the NNRG mis-characterizes AppleTree's arguments and advances constructions that are flatly inconsistent with the text of the Zoning Regulations.

I. Under 11 DCMR § 401.1, an Enlargement of AppleTree's Pre-1958 Building Is Exempt from Minimum-Lot-Area and Minimum-Lot-Width Requirements Because Its Planned Use Complies with "All *Other* Provisions" of the Zoning Regulations

As AppleTree explained in its opening brief and at the public hearing, the plain terms of § 401.1 of the Zoning Regulations apply to this case. Because AppleTree's lot was improved in 1958, it may "enlarge" its building without regard to lot-width or lot-area requirements as long as it meets "all other provisions" of the Zoning Regulations.

In response, the NNRG contends that AppleTree's reading of § 401.1 produces the "absurd result" of holding conforming lots to higher standards than nonconforming lots. NNRG Reply at 3. That allegation is simply false.[1]

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[1] The only non-"conformity" tolerated under AppleTree's reading of § 401.1 is (as the text of the provision itself indicates) a "lot area, or width of lot, or both" less than § 401.3 requires. If a

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Rather than present a plausible alternative reading — or *any* alternative reading — of § 401.1, the NNRG asserts that the provision was, "*by implication*, supercede[d]" when the Zoning Commission adopted an emergency text amendment in February 2006. NNRG Reply at 3 (emphasis added). But the NNRG provides no evidence to support its inference. It cites no prior instance in which an exception to § 401.1 has been made, whether explicitly or implicitly, for a particular use. Instead it claims that "public charter schools" were a "new use of land in the R-4 district" that was "established and authorized" by the emergency text amendment. NNRG Reply at 3. Even assuming that would somehow be relevant, it is not accurate. The Commission's emergency rule expressly altered the height, area, and density regulations for *all* "public schools" (whether charter or not) in the R-1, R-2, R-3, R-4, R-5-A, R-5-B, R-5-C, R-5-D, and R-5-E districts. *See* Notice of Emergency and Proposed Rulemaking, 53 DCR 2017, 2018–20 (March 17, 2006).

The best evidence of whether the Zoning Commission intended to effect a partial repeal of the long-standing background rule in § 401.1 is, of course, the text of its emergency amendments, which tellingly left § 401.1 intact while making changes to several provisions just before and just after it. The obvious inference to be drawn from the Commission's decision to amend §§ 400.10, 400.11, and 401.3, and to add new provisions as §§ 401.8 and 401.9, while not amending § 401.1, is that the Commission did not mean to affect the operation of § 401.1.

Attempting to evade the lack of evidence for a partial repeal of § 401.1, the NNRG seeks refuge in the "complicated, interrelated" nature of the Zoning Regulations, and insinuates that

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lot was improved in 1958 and fails to meet one or both of those two criteria (but fails nothing else), § 401.1 expressly permits the building to be "enlarged or replaced by a new building." That reading does not require "a conforming property" to meet "more restrictive requirements," as the NNRG contends. NNRG Reply at 3. The only ways a property could be more "conforming" would be with regard to lot area or width of lot, in which case it would, by definition, have already met the "more restrictive" requirements.

flawed amendments are to be expected "in spite of [the Zoning Commission's] best efforts." NNRG Reply at 3. But there is nothing complicated about the relationship between § 401.1 and § 401.3, which has not changed since the modern Zoning Regulations were adopted in 1958.

Moreover, in this particular case, there is no reason to think that the Commission's failure to amend § 401.1 was the result of an oversight. Before the Zoning Administrator made the decision under review, the NNRG's counsel was in direct communication with the Office of Planning, asking whether § 401.1 "might call for more tinkering with the language of the propose[d] regulations" and "underscor[ing] the need to . . . eliminate any inconsistencies [between the proposed regulations and] other provisions of the ZR, or else insert some language that would operate as a supremacy clause, in effect giving the public school provsions [*sic*] priority over any conflicting regulations."[2] (The NNRG's counsel was also, as he had been since AppleTree filed its building-permit application, in direct communication with the Zoning Administrator, though he was less forthcoming in that context about the Zoning Commission's evident failure to include some provision that would preempt the normal operation of § 401.1.[3]) Nevertheless, when the Commission "re-adopt[ed], on an emergency basis, [the] amendments to §§ 199.1, 400.10, 400.11, 401.3, 401.8, [and] 403.1," it still gave no indication that it meant to repeal § 401.1 in part. *See* Notice of Emergency Rulemaking, 53 DCR 5895 (July 21, 2006).

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[2] E-mail message from George Keys to Jennifer Steingasser, Office of Planning, *Re: Zoning Commission Case No 06-06 – Charter Schools* (Apr. 7, 2006, 11:53 AM); E-mail message from George Keys to Jennifer Steingasser, Office of Planning, *Re: ZC Case No . 06-06 – Public School Amedments* [*sic*] (Apr. 12, 2006, 6:21 PM). True and accurate copies of these e-mails, which were obtained by AppleTree in response to a FOIA request to the Office of Planning, are attached as Exhibit N. (For the Board's convenience, we resume designations for AppleTree's exhibits where its opening brief left off.)

[3] Exhibit O contains copies of February 16, 2006 e-mail correspondence between Mr. Keys and the Zoning Administrator and an April 12, 2006 letter from Mr. Keys to the Zoning Administrator, all of which were attached as exhibits to briefs that the NNRG filed in the D.C. Superior Court in *Northeast Neighbors for Responsible Growth, Inc. v. District of Columbia*, Civ. Action No. 06-0685, before that suit was dismissed.

The NNRG's interpretive methodology has no logical starting or stopping point. It is not suggested by anything in the text of the emergency rulemaking, and there is nothing in that text (or anywhere else) to indicate whether the "implic[it]" exception to § 401.1 would apply only to public charter schools, or to all public schools, or only to uses in the R-4 district, or to *any* future amendments to § 401.3, or to anything else. And, because there is no established tradition of making exceptions to § 401.1, there is nothing to limit that methodology to § 401.1 itself. Allowing the Zoning Administrator to construe the Zoning Regulations in such an untethered and unpredictable way would deprive the public of the benefit of having written regulations and be inconsistent with this Board's established practice of treating the text of the Zoning Regulations as if it matters. Allowing the reasonable, investment-backed expectations of landowners to be dashed by the application of unwritten codicils that were never publicly debated and adopted by the Zoning Commission would make a mockery of the rule of law and be inconsistent with the District's constitutional obligations to provide due process.

As explained in AppleTree's opening brief, the Board should simply do what it has done in prior cases and apply § 401.1 as it is written.

II. Under 11 DCMR § 2100.5, AppleTree's Building, Which Is Certified as Contributing to a Historic District, Requires No Additional Parking Spaces

AppleTree has consistently maintained that, under § 2100.5 of the Zoning Regulations, it is not required to provide "additional parking spaces" at the Subject Property, even though it proposes new construction and a change of use. *See* Brief of Appellant at 7–9. AppleTree has also consistently maintained that, although there are currently no legally marked spaces on the Subject Property, a good-faith attempt to determine how many spaces are constructively present yields three spaces — and there is no evidence in the record indicating that the NNRG or the

Zoning Administrator ever questioned that conclusion before the Zoning Administrator made the decision under review.

The NNRG tacitly concedes that AppleTree does not propose the elimination of any *actual* parking spaces from the property. Instead, it contends that AppleTree is "*in effect*, eliminating parking spaces." NNRG Reply at 5 (emphasis added). The NNRG reaches that conclusion by using as its baseline not any reasonable estimate of how many spaces are actually present on the Subject Property but only a calculation of what would notionally be required for "the last use of the subject property." NNRG Reply at 4. The NNRG concludes that there are seven spaces on the property simply because that is the number of spaces that would have been required by the "private club" that previously operated there, assuming that no grandfather clause applied to the prior use. *Id.*[4] The NNRG also claims that, at certain times in the past, "as many as ten (10) vehicles used the parking area" at the Subject Property. *Id.* at 5.

As the testimony at the Board's November 21, 2006 public hearing made clear, the NNRG's number bears no relation to reality on the ground, to the Zoning Administrator's April 28, 2006 decision that AppleTree must provide ten parking spaces, or to the Zoning Administrator's concession at the hearing that there are not even as many as seven legal spaces at the Subject Property.

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[4] In fact, the private club was not even located on the same lot of record as the asphalt area that has previously been used for parking, because, until 2006, when AppleTree sought and received a reverse subdivision of the parcel, the Subject Property comprised three different lots. *See* Exhibit No. 4 in this case (surveyor's plat, indicating that subdivision had been ordered). That fact greatly complicates any analysis about the interaction of the 1958 imposition of parking requirements under the Zoning Regulations, the 1958 office use at the Subject Property, the 1969 private-club use at the Subject Property, and the 1976 designation of the Capitol Hill Historic District. Of course, such complications are irrelevant under AppleTree's proposal, which relies on AppleTree's good-faith attempt — which went utterly uncontested before the Zoning Administrator made the decision under review — to determine how many *legal* parking spaces would reasonably fit in the space on the new lot of record that has in fact been previously used for parking (even if only in an occasional, haphazard way).

In light of § 2100.5's clear command that "[n]o *additional* parking spaces shall be required" for a contributing structure (emphasis added), it would be nothing short of perverse to conclude that AppleTree is heretofore required to provide seven spaces — something that could not be done without demolishing parts of the building that has stood on the Subject Property for ninety years. Furthermore, the allegation that "as many as ten" vehicles have been parked at the Subject Property (in a manner that had no regard for the requirements of Chapter 21 of the Zoning Regulations) can have no bearing on how many *legal* parking spaces exist.

This Board should hew to its longstanding interpretation of § 2100.5, find that nothing in the record supports the conclusion that AppleTree is required to preserve any more than three parking spaces at the Subject Property, and conclude that AppleTree's application complies with Chapter 21 of the Zoning Regulations.

Respectfully Submitted,

Dated: December 12, 2006

Mark A. Perry
Curtis E. Gannon
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Washington, D.C. 20036-5306
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Attorneys for Appellant AppleTree Institute for Education Innovation, Inc.

PROOF OF SERVICE

On December 12, 2006, I sent a copy of the foregoing Reply Brief of Appellant, with its attached exhibits, by first-class mail, to the Zoning Administrator for the District of Columbia, to Advisory Neighborhood Commission 6A, and to George Keys (counsel to Intervenor Northeast Neighbors for Responsible Growth).

Curtis E. Gannon

Appeal No. 17532
List of Exhibits Attached to the Brief of Appellant in Response to Intervenor's Reply Brief

E-mail message from George Keys to Jennifer Steingasser, Office of Planning, *Re: Zoning Commission Case No 06-06 – Charter Schools* (Apr. 7, 2006, 11:53 AM); E-mail message from George Keys to Jennifer Steingasser, Office of Planning, *Re: ZC Case No . 06-06 – Public School Amedments* [*sic*] (Apr. 12, 2006, 6:21 PM) ..... N

E-mail messages between George Keys and Bill Crews, *Re: Charter School Emergency Zoning Regulations* (Feb. 16, 2006); Letter from George Keys to Bill Crews, Zoning Administrator, *Re: Proposal for AppleTree Institute Charter School – 138 12th Street, N.E.* (Apr. 12, 2006) ..... O

From: Steingasser, Jennifer (OP)
To: "George Keys";
CC: Parker, Travis (OP);
Subject: RE: Zoning Commission Case No 06-06 - Charter Schools
Date: Friday, April 07, 2006 4:48:41 PM
Attachments:

George,
I haven't seen the letter but I agree with you that 401 shouldn't provide an out from the other criteria for schools or the emergency. But it's probably worth clarifying with a quick amendment to 401.1 as part of the final report. I don't think such a clarification would hold up any final action.
Thanks for the heads up.

Jennifer Steingasser, AICP, Deputy Director
Development Review and Historic Preservation Division
DC Office of Planning
Ph: 202-442-8808
Fax: 202-535-2497
Jennifer.Steingasser@dc.gov

-----Original Message-----
From: George Keys [mailto:gkeys@jordankeys.com]
Sent: Friday, April 07, 2006 11:53 AM
To: Jennifer.Steingasser@dc.gov
Subject: Zoning Commission Case No 06-06 - Charter Schools

Jennifer: I came across a letter in the case file in this matter posted on 3/13/06, addressed to Bill Crews and copied to the ZC members, from AppleTree Institute's architects. The letter was not sent to anyone else. Among its claims was the assertion that the adoption of emergency regulations should not prevent DCRA from processing AppleTree's building permit application, because Section 401.1 permits the enlargement of pre-1958 buildings which lack required lot area or lot width. Although I think their reasoning fails for other reasons related to their proposal, it does make me wonder whether 401.1 could provide an escape

hatch for pre-1958 buildings in other contexts. It seems to me the intent of the emergency and proposed regulations was to ensure that a public/charter school lot would contain enough street frontage for student drop-off and enough land area for recreation space. Do you see 401.1 as a concern in this regard, which might call for more tinkering with the language of the propose regulations? I will be pleaed to fax you the letter, if you want to review it. Please advise.

From: George Keys

To: Jennifer.Steingasser@dc.gov;

CC:

Subject: ZC Case No . 06-06 - Public School Amedments

Date: Wednesday, April 12, 2006 6:21:09 PM

Attachments:

Jennifer: I have a disturbing feeling that DCRA is undertaking a review of the building permit application of Appleree Charter School at 136-138 12th Street NWE, a mid-block row structure on a 36-foot lot with 4500 sq ft.of land area. Their theory is set forth in the dBF letter I faxed to you and my reply which was hand-delivered to you today. The applicant is pressing DCRA to ignore the ZC's manifest intent with the emergency rulemaking. This underscores the need to re-examine the proposed regulations and eliminate any inconsistencies with other provisions of the ZR, or else insert some language that would operate as a supremacy clause, in effect giving the public school provsions priority over any conflicting regulation. Does OP have a responsibility now to remind Bill Crews what the ZC was up to with the emergency ruleamking?

Don Dinan

From: Faling, Herb [hfaling@sigal.com]
Sent: Thursday, February 23, 2006 10:38 AM
To: Don Dinan
Subject: FW: Charter School Emergency Zoning Regulations

-----Original Message-----
From: Crews, Bill (DCRA) [mailto:Bill.Crews@dc.gov]
Sent: Thursday, February 16, 2006 6:51 PM
To: George Keys
Cc: Cody Rice
Subject: RE: Charter School Emergency Zoning Regulations

George,

DCRA received a building permit application from Appletree last week. From
my reading of the regs, it will have to comply with the emergency text amendment. With just a preliminary review, there are two areas where it doesn't comply with the previous regs - lot frontage and parking.

We will be reviewing the plans in the normal course of reviews, no special treatment.

If you have further questions, please let me know

Best regards,

Bill Crews

Zoning Administrator for the District of Columbia Department of Consumer and Regulatory Affairs
941 N. Capitol St. NE Suite 2000
Washington, DC 20002
202.442.4576 Office
202.442.4871 Fax
bill.crews@dc.gov

The Office of the Zoning Administrator is looking for additional zoning review technicians. If you or someone you know might be interested, please review the job description posting reference #2709 on the District Office of Personnel website www.dcop.dc.gov and contact the Zoning Administrator

-----Original Message-----
From: George Keys [mailto:gkeys@jordankeys.com]
Sent: Thursday, February 16, 2006 10:42 AM
To: Bill.crews@dc.gov
Subject: Charter School Emergency Zoning Regulations

Bill: Surely you have heard about the Zoning Commission meeting on Monday and the adoption of emergency regulations for a portion of the Office of Planning proposed text. I also understand that Appletree Institute Charter School filed a building permit application at the end of last week for the builidng at 138 12th Street, NE. This puts matters right back where we were when we discussed this last year. At that time you felt you lacked sufficient authority or clarity in the Zoning Regulations to apply the regulations to a "charter school" application as a "public school".
Now,
you have a clear indication where the Zoning Commission is heading and clearly they want to limit public school development on undersized lots in low density residential districts. How will this impact your consideration of the pending building permit? I would like to disucss this with you, or if you prefer, I could write something up for you to consider. Please advise.

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+Also Admitted in Maryland

OF COUNSEL:
HAROLD E. JORDAN

E-mail: gkeys@jordankeys.com

April 12, 2006

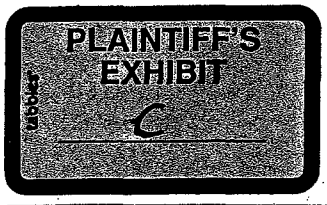
HAND-DELIVERED

Bill Crews
Zoning Administrator
Building and Land Regulation Administration
D.C. Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Room 2000
Washington, D.C. 20002

Re: Proposal for AppleTree Institute Charter School
- 138 12th Street, N.E.

Dear Mr. Crews:

This firm represents Northeast Neighbors for Responsible Growth, Inc., a local nonprofit representing the Ward 6 neighborhoods affected by charter school development on inappropriate lots. I write with particular reference to the March 6, 2006 letter to you from dBF Architects, which was appended surreptitiously to the Zoning Commission case file in this case. In that letter, the architects contend that, in spite of the emergency rulemaking which clearly stated the Zoning Commission's intent to forestall development of public and charter schools in inappropriate locations, the application of AppleTree Institute may nonetheless proceed. In doing so, it relies on a patchwork analysis of disparate parts of the Zoning Regulations, particularly § 401.1. Interestingly, the letter does not cite to § 401.1 in full, but conspicuously omits the lead clause: "Except as provided in Chapters 20 through 25 of this title". The effect of this clause is to qualify everything which follows. Among other things, this clause points directly to the parking requirements of Chapter 21, which AppleTree cannot meet on site under either the existing or the proposed provisions



of § 2101.1. The remedy under existing regulation is referral to the Board of Zoning Adjustment for variance or special exception relief under §§ 3103.2 or 2116.5, respectively.

The Zoning Commission made its intent perfectly clear in the Notice of Emergency Rulemaking and Proposed Rulemaking published in the D.C. Register on March 17, 2006 at p. 2017:

> However, the immediate proliferation of Charter Schools in residence districts has the potential for adverse impacts unless the current area requirements for public schools are made more restrictive. The emergency action therefore includes amendments to the area provisions that govern public schools in residence zones.

The Zoning Commission intended that the emergency rulemaking would have the effect of imposing new minimum area requirements on public schools (now enlarged as a category to include charter schools). To construe § 401.1 otherwise would be to create a permanent loophole would be to nullify the expressed intent of the Zoning Commission.

We urge you to reject the argument advanced by AppleTree's architects and hold AppleTree to the standards intended by the Zoning Commission.

Very truly yours,

George R. Keys, Jr.

cc: Herb Faling
Dean Rosen